UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
MAGISTRATE. NO. 10-MJ-739-01-13 et.al.

UNITED STATES OF AMERICA	*
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	*
v.	* **Mag. No. 10-739-01, et.al.**
	* **Mag. Judge Alan Kay**
	*
RAPHAEL FARROW, et.al.	*
Defendants	*

MOTION FOR LEAVE TO WITHDRAW GUILTY PLEA OF DEFENDANTS MIRIAM BEN-SHALOM and IAN FINKENBINDER WITH INCORPORATED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

COMES NOW, Defendants Miriam Ben-Shalom, and Ian Finkenbinder, by and through their co- counsel, Mark L. Goldstone, pursuant to Rule 11(d) of the Federal Rules of Criminal Procedure, and hereby respectfully requests leave of this Honorable Court to withdraw their guilty pleas. As stated below, there are “fair and just” reasons to allow this Court to exercise its discretion and permit the withdrawal of the guilty pleas taken by the Court on May 10, 2011.

In support of this motion, the following points and authorities are stated:

Background

1. On November 15, 2010, defendants Ben-Shalom, and Finkenbinder were arrested by United States Park Police officers along with a total of 13 people during a “Don’t Ask, Don’t Tell”(DADT) demonstration on the sidewalk area in front of the White House. The defendants were alleged to have handcuffed themselves to the White House fence and refused to leave when ordered to do so by the Park Police officers. The defendants were

charged in the United States District Court for the District of Columbia with failing to obey a lawful order in violation of 36 C.F.R. Sec. 1.3.(2011) If convicted, the defendants faced up to six months in jail and a maximum fine of $500. 36 C.F.R. Sec 1.3 (2011) and 16 U.S.C Sec 3 (2011).

All 13 defendants were offered the opportunity to resolve their case without going to trial by agreeing to a deferred-sentencing agreement (DSA.) Under the DSA, in return for pleading guilty to the charge of failure to obey a lawful order, the government agreed to dismiss each of the protesters cases, if, for the subsequent four month period , the protesters were not arrested and complied with all other conditions set by the Magistrate Judge. Twelve of the thirteen protesters accepted the DSA on May 10, 2011, with only Defendant Daniel Choi, Magistrate No. 10-739-11 refusing to accept the DSA and Defendant Choi demanded a trial.

Trial commenced against co-defendant Choi on August 29, 2011 before Magistrate Judge Facciola. Defendant Choi raised a selective prosecution claim based on dissimilar treatment between the treatment of his demonstration and members of the public who gathered outside the White House and demonstrated in celebration of the death of Osama Bin Laden. Choi also raised the issue of vindictive prosecution in that he was brought up on federal charges in federal court for his arrest in November, 2010, despite earlier arrests at the White House fence which resulted him being brought up on minor DC charges in DC Superior Court. Magistrate Judge Facciola made a preliminary finding of a prima facie showing of vindictive prosecution. The Government filed a Writ of Mandamus on September 12, 2011, to the United States District Court seeking a reversal of the Magistrate Judge's decision among other relief. That Writ is pending.

2.On May 10, 2011, the Court accepted guilty pleas pursuant to the DSA of

defendants Ben-Shalom, and Finkenbinder, among a total of 12 defendants. A written Deferred Sentencing Agreement, with a Statement of the Offense, was executed by Ben-Shalom, and Finkenbinder among a total of 12 defendants, undersigned counsel, co-counsel Ann Wilcox and by the U.S. Attorney's Office. Undersigned counsel contacted Assistant United States Attorney Angela George four months after the inception of the DSA on September 12, 2011, to inquire whether the cases were going to be dismissed as to Counsel's knowledge, all defendants were in compliance with the terms of the agreement. Ms. George indicated that the defendants were in compliance and a Motion to Dismiss had been prepared and forwarded to Magistrate Judge Kay for signature. Undersigned counsel was contacted by counsel for Dan Choi and Dan Choi and advised that there were irregularities and improprieties that were uncovered in the prosecution and trial of Mr. Choi that counsel and defendants needed to be aware of. Counsel contacted all defendants and alerted them to these irregularities and improprieties alleged by counsel for Choi and Choi and two defendants, Ben-Shalom and Finkenbinder requested counsel to withdraw their plea. Counsel contacted Angela George and Magistrate Judge Kay's chambers to alert them that Magistrate Judge Kay should not sign the Order dismissing those cases.

3. As a basis for the withdrawal Ms. Ben-Shalom and Mr. Finkenbinder have advised counsel of the following based upon revelations of government misconduct in their arrest and prosecution which came to light in co-defendant Choi's trial after they had entered their plea on May 10, 2010:

a. That they are not guilty of the charges to which he pled guilty.

b. That they do not agree with Statement of Facts, which is attached to the Plea Agreement.

c. That they was unduly "pressured" and "railroaded" by the U.S. Attorney's Office, into accepting the plea agreement.

Simply stated, Ben-Shalom and Finkenbinder did not tender a knowing and voluntary guilty plea. As such, the plea is invalid. *Singer v. United States*, 380 U.S. 24, 34 (1965).

Argument

4. Rule 11(d) of the Federal Rules of Criminal Procedure states:

> A defendant may withdraw a plea of guilty or nolo contendre:
>
> > (1) before the court accepts the plea, for any reason or no reason; or
> >
> > (2) after the court accepts the plea, but before ir imposes sentence if;
> >
> > (A) the court rejects a plea agreement under Rule 11(c)(5); or
> >
> > (B) the defendant can show a fair and just reason for requesting the withdrawal.

5. In *United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991),[1] the Court noted six factors to be considered in a motion to withdraw a guilty plea. Those factors are:

a. Whether the defendant provided credible evidence that his plea was not knowing or voluntary;

b. Whether the defendant credibly asserted his legal innocence;

c. Whether there was a delay between entering the plea and moving for withdrawal;

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1 See *also United States v. Ubakanma,* 215 F.3d 421, 424 (4th Cir. 2000); *United States v. Pitino,* 887 F. 2d 42, 46 (4th Cir. 1989); *United States v. DeFreitas,* 865 F. 2d 80 (4th Cir. 1989).

d. Whether the defendant had close assistance of competent counsel.

e. Whether withdrawal will prejudice the government; and

f. Whether withdrawal will inconvenience the court and waste judicial resources.

6. Concerning the first factor of the *Moore* test, on or about September 12, 2011 Ben-Shalom and Finkenbinder first learned the extent of the Government misconduct that surfaced in the co-defendant trial of Dan Choi, and led to the belief that they are not guilty of the charge to which they pled guilty. Additionally, they insist that their decision to sign the written Plea Agreement and to plead guilty on May 10, 2011, was the result of their not being given complete information by the U.S. Attorney's Office, about taking the plea, because the consequences of facing a permanent conviction and 6 months in jail rather than a minor charge that could be diverted or posted and forfeited upon in Superior Court were the result of selective or vindictive prosecution. In addition during the Choi trial there was a possible discovery violation unearthed in that documents critical to the defense case were not revealed until the Choi trial in August, 2011, months after a timely defense discovery request for "all documents" back in March 2011. Specifically, an email from the Department of the Interior's Solicitor (General Counsel) indicating to the Park Police that the Solicitors office admitting to having prior knowledge of the demonstration despite the fact that the demonstration was a secret and a surprise action, and before the arrests, the Solicitor weighing in on all the possible federal violations that the Government could get the demonstrators convicted, thereby suggesting a bad motive. They believe that on May 10, 2011, in the absence of the later developed information, they had no real choice other than to plead guilty, given that they

were selected for harsh treatment by being brought into federal court as a way to silence and punish Dan Choi who was arrested with them and had previously been brought up on only minor charges in Superior Court, and not faced with six months in federal prison and a permanent criminal conviction on their record which would possibly impact their ability to hold Government positions, or be accepted back into the military even after being kicked out for being gay or lesbian, now that Don't Ask Don't Tell has been repealed.

7. The second factor of the *Moore* test addresses legal innocence. Defendants Ben-Shalom and Finkenbinder adamantly maintain their innocence as to the charge of failure to obey a lawful order contained in the Indictment.

8. The third factor of the *Moore* test concerns the timeliness of the motion. The defendants entered their pleas on May 10, 2011. Immediately upon learning of the improprieties that surfaced in Choi's trial on August 30, on or about September 12, 2011 through reading the transcripts of the August 30 trial of Choi, and listening to Choi and Choi's counsel explain the Government misconduct, defendants through counsel attempted to notify the Magistrate Judge (and also notified AUSA George) to not sign the Dismissal Order because they intended to withdraw their plea. Counsel believes that this notification took place before the Judge signed the order which dismissed the cases. This short period of time between the learning of the Government misconduct, and the notification and then filing of this instant motion is, certainly, timely.

9. The fourth factor dictated by *Moore* test concerns the competent assistance of counsel, which is not at issue in the instant case.

10. The fifth and sixth factors which the *Moore* court says must be considered

is the extent of prejudice to the United States and the inconvenience to the court and potential for the wasting judicial resources. It is believed that the United States fully "readied" this matter for trial in the co-defendant Choi case (which began on August 29 and was recessed several days later, to allow consideration of the Writ of Mandamus) and, consequently, should not be prejudiced in obtaining its witnesses who are all local Park Police officers, or otherwise preparing for trial. The Government has been investigating and preparing this case since November 2010. Furthermore, it is believed that judicial resources will not be burdened in light of estimated short length of a trial, likely to last no more than a day.

11. When the Court evaluates the *Moore* factors, it should reach the conclusion to allow defendants Ben-Shalom and Finkenbinder to withdraw their guilty pleas. Under the circumstances presented, there are compelling "fair and just" reasons for this Court to exercise its discretion and allow them to withdraw their guilty pleas, proceed to a non-jury trial.

12. A hearing on this Motion for Leave to Withdraw Guilty Plea is requested.

WHEREFORE, for the foregoing reasons and such other reasons that may appear "fair and just, "Defendants Ben-Shalom and Finkenbinder, by and through his co-counsel, Mark Goldstone pursuant to Rule 11(d) of the Federal Rules of Criminal Procedure, respectfully requests leave of this Honorable Court to withdraw their guilty pleas.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 2011, a courtesy copy of Defendant's Motion for Leave to Withdraw Guilty Pleas with Incorporated Memorandum of Points and Authorities, along with a proposed Order, was delivered by e-mail or by postage pre-paid first class mail, to:

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Mark Goldstone